Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

DERRAL G. ADAMS, Warden; C.A. TERHUNE, Director, California Department of Corrections, *Petitioners,*

v.

MICHAEL D. BRAMBLES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In 1981, this Court held in *Rose v. Lundy* that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims," known as "mixed petitions." *Rose v. Lundy*, 455 U.S. 509, 516, 522 (1981). In 1996, Congress enacted a one-year period of limitation to file habeas petitions. 28 U.S.C. § 2244(d).

Is dismissing a mixed petition under *Rose v. Lundy* improper unless the district court first offers to stay the federal proceedings pending exhaustion of state remedies and advises that the period of limitation would bar a future petition?

2. In *Duncan v. Walker*, this Court held that a prior mixed habeas petition does not *statutorily* toll the one-year period of limitation, but noted that it "had no occasion to address . . . the availability of *equitable* tolling." *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (emphasis added).

May the period of limitation be equitably tolled if a district court dismissed a prior mixed habeas petition after the period expired without offering to stay the petition pending exhaustion and advising that the period would bar a future petition?

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PETITION FOR WRIT OF CERTIORARI

Derral G. Adams, Warden of California Substance Abuse Treatment Facility at Corcoran, California, and C.A. Terhune, Director of the California Department of Corrections (hereafter collectively referred to as "the State"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1/]

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit is reported as *Brambles v. Duncan*, 330 F.3d 1197 (9th Cir. 2003), and is reproduced in section A of the Appendix to this petition. The relevant orders of the district courts in this case and the prior case are

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1. In the proceedings below, Warden W.A. Duncan was listed as respondent Michael D. Brambles's custodian. Brambles's present custodian is Derral G. Adams.

unreported and are reproduced in sections B, C, D, E, F, G, and H of the Appendix.

STATEMENT OF JURISDICTION

On June 3, 2003, the Ninth Circuit entered its judgment reversing and remanding with instructions. The State timely invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State . . . .

STATEMENT OF THE CASE

In 1996, a Los Angeles County jury convicted Michael D. Brambles, a former Los Angeles police officer, of eighteen robberies, six sexual offenses, and two assaults with a firearm. On June 3, 1998, the California Court of Appeal affirmed the judgment of conviction. On September 2, 1998, the California Supreme Court denied Brambles's petition for review.

On June 29, 1999, in case number CV 99-06676-MMM, Brambles filed a timely habeas corpus petition in the United States District Court for the Central District of California. On December 13, 1999, the court found that Brambles had not exhausted available state-court remedies on two of the petition's three claims. As a result, the court ordered that Brambles either proceed on the merits of the exhausted claim by dismissing the two unexhausted claims, or else request the court to dismiss the

entire petition without prejudice to filing a future petition once Brambles exhausted state remedies as to all claims. The court's written order further cautioned Brambles in boldface "that recently amended 28 U.S.C. § 2244 limits the time period within which a petition may be filed," and quoted 28 U.S.C. § 2244(d). App. F. On December 1, 1999, the one-year period of limitation under 28 U.S.C. § 2244(d) (the "AEDPA") expired. On December 29, 1999, Brambles filed a motion to dismiss the petition for failure to exhaust state remedies. On January 20, 2000, the district court dismissed the petition without prejudice for failure to exhaust state remedies. App. G, H.

On April 11, 2000, in order to exhaust state remedies, Brambles filed a habeas corpus petition in the California Supreme Court. On June 28, 2000, the court denied the petition. On July 31, 2000, in case number CV 00-08180-MMM, Brambles filed another federal habeas corpus petition in district court. On February 20, 2001, the district court entered judgment denying the Petition with prejudice as untimely. App. B, C, D, E.

In a published opinion, the Ninth Circuit reversed. App. A5. It held that equitable tolling made the petition timely because the district court in the prior case (1) did not explain to Brambles that the one-year limitation had expired when the district court dismissed the first petition; (2) did not inform Brambles of the "option" of deleting the unexhausted claims, moving to stay proceedings in federal court, exhausting the unexhausted claims in state court, and then returning to federal court and moving to amend his petition to include all exhausted claims (the Ninth Circuit's "stay-and-abey" procedure); and (3) did not advise Brambles that a future petition would be untimely. App. A5-A6, A8-A11. In calculating the amount of equitable tolling, the Ninth Circuit explained it was placing "Brambles in the position he likely would have been in absent the [prior] district court's erroneous dismissal of the first

petition." App. 13.[2/] All three claims in the petition therefore were timely. App. A11-A13. In a concurring opinion, Judge Rawlinson stated, "I concur in the result because, and only because, the outcome reflected in the majority opinion is dictated by [Ninth Circuit law]." App. A14.

REASONS FOR ISSUING THE WRIT

I.

The Ninth Circuit has decided an important and recurring issue regarding the dismissal of mixed habeas petitions under *Rose v. Lundy* in a way that conflicts with decisions of this Court, requires a meritless stay-and-abeyance procedure, places a significant burden on the district courts, and also conflicts with decisions of other circuit courts of appeals.[3/]

Effectively overruling over twenty years of Supreme Court precedent, the Ninth Circuit has held that a district court errs by dismissing a mixed petition without prejudice unless the district court informs the habeas petitioner that he may pursue the stay and abey process in lieu of dismissal. App. A9. This Court has

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2. This totals 398 days of equitable tolling in this case, consisting of (1) the time that the prior federal petition was pending, 205 days; plus (2) the time in between the dismissal of the prior federal petition and the filing of the California Supreme Court habeas corpus petition, 82 days; plus (3) the time that the California Supreme Court habeas corpus petition was pending, 78 days; plus (4) the time in between the denial of the California Supreme Court habeas corpus petition and the filing of the present federal petition, 33 days.

3. This question presents the same issue as the first question presented in a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2003), *petition for cert. filed sub nom., Pliler v. Ford*, ___ U.S.L.W. ___ (U.S. Aug. 8, 2003) (03-221).

never endorsed that approach. Instead, this Court has flatly held that "a district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. at 522 (emphasis added). The Ninth Circuit's stay-and-abey procedure evades the federal courts' jurisdictional duty to promptly resolve challenges to final state convictions.

The Ninth Circuit also requires district courts to calculate and then provide warnings about the AEDPA's limitation period before dismissing a mixed petition. Specifically, a district court in the Ninth Circuit must now advise a habeas petitioner that dismissing a partially unexhausted petition after the period expires "would effectively be with prejudice unless he could establish that the limitations period was equitably tolled." App. A9. Again, this Court has never required such warnings or advisements; nor has it ever held that their absence renders the dismissal of a mixed petition erroneous. *See Duncan v. Walker*, 533 U.S. 167, 178-79 (2001); *Rose v. Lundy*, 455 U.S. at 522. As one federal appellate judge has explained, "It is one thing to construe a pro se petitioner's pleadings liberally, and to require the district court to explain its reasons for dismissing a complaint. It is quite another thing to require the district court judge to act as petitioner's legal advisor." *Ford v. Hubbard*, 330 F.3d 1086, 1109 (9th Cir. 2003) (Silverman, J., dissenting).

Also, at least three other circuit courts of appeals have rejected the Ninth Circuit's approach. Thus, the Ninth Circuit's decision conflicts with *Rose v. Lundy*, institutionalizes a meritless stay-and-abeyance procedure, imposes new and onerous burdens on district courts in ruling on mixed habeas petitions, and clashes with the holdings of other federal appellate courts.

1. This Court has repeatedly held that "because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, . . . a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. at 522; *id.* at 518-19 ("[a] rigorously enforced total exhaustion rule will encourage

state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("[t]his Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) ("[r]espondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims"); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("[i]n *Rose v. Lundy*, . . . the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed"); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) ("[i]f [an unexhausted] claim were present, *Rose v. Lundy* . . . would mandate dismissal of the entire petition").

More recently, in *Duncan v. Walker*, 533 U.S. at 167, this Court reaffirmed that principle by concluding that "[t]he exhaustion requirement of § 2254(b) ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79. The *Duncan* majority also noted that statutorily "[t]olling the limitation period for a federal habeas petition that is dismissed without prejudice would . . . create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner." *Id.* at 180.

In this case, Brambles failed to dismiss his unexhausted claims in his prior federal habeas corpus petition despite the prior district court's giving him that option under *Rose v. Lundy*. Furthermore, the prior district court warned Brambles that his petition would be dismissed if he did not delete his unexhausted claims. In addition, the district court notified Brambles of the one-year limitation period. When Brambles chose to file a

motion to dismiss, the district court did what it was supposed to do: it dismissed the mixed petition in compliance with *Rose v. Lundy*. The Ninth Circuit's conclusion that the petition was "erroneously dismissed" is therefore inconsistent with controlling Supreme Court precedent.

2. Equally troubling is the Ninth Circuit's circumvention of the AEDPA's limitation period through the establishment of a procedure whereby a mixed petition may be filed, unexhausted claims dismissed, and a stay of proceedings obtained for the purpose of exhausting the dismissed claims in state court. Thus, as long as a petitioner files one exhausted claim before the expiration of the statutory period, he may obtain a stay of the proceedings to exhaust any newly-presented claims, and later add those claims to the pending petition by way of amendment. If allowed to stand, the Ninth Circuit's holding would render the AEDPA's limitation period toothless, and reduce district courts to "a jurisdictional parking lot." *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995). As this Court stated in *Rose v. Lundy*, "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." 455 U.S. at 520. The Ninth Circuit's holding will encourage the very opposite.

Indeed, when federal courts assume jurisdiction over a case, they have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *In re Blodgett*, 502 U.S. 236, 239-40 (1992) (*per curiam*). This is especially true in habeas proceedings, where the state judgment's finality depends on the federal review's conclusion.

3. The Ninth Circuit's holding requiring a stay-and-abey procedure squarely conflicts with the decisions of two other circuit courts of appeals. In *Victor v. Hopkins*, 90 F.3d 276 (8th Cir. 1996), the Eighth Circuit held that district courts lack

authority to hold mixed petitions in abeyance, even in capital cases. As the court stated:

> We conclude that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition including both exhausted and unexhausted claims pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*. . . . The correct view is represented by our line of cases . . . in which we have given recognition to the clear teaching of *Rose v. Lundy* regarding the treatment of mixed petitions. Accordingly, we hold that the District Court has no authority to hold Victor's mixed petition in abeyance or to maintain the stay of execution. The choices stated in *Rose v. Lundy* are the only options available to a habeas petitioner.

Id. at 282; *see also Jackson v. Dormire*, 180 F.3d 919, 920 (8th Cir. 1999) (following *Victor*); *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (same).

In *Sterling v. Scott*, 57 F.3d at 451, the Fifth Circuit also upheld the district court's dismissal of a mixed habeas petition in a capital case:

> As referred to earlier, 28 U.S.C. § 2254(b) provides that an application for a writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." . . . The district court must also dismiss a mixed petition, such as Sterling's petition, containing both exhausted and unexhausted claims. . . . Accordingly, the district court was correct in dismissing Sterling's amended federal petition for failing to exhaust his state remedies as required in § 2254, and the district court did not err in refusing to

> hold in abeyance a petition over which it simply and plainly had no jurisdiction. . . .

Id. at 454; *see also Alexander v. Johnson*, 163 F.3d 906, 908 (5th Cir. 1998) ("[a] habeas petition containing both exhausted and unexhausted claims is a 'mixed' petition which should be dismissed without prejudice"); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) ("[a] federal habeas petition should be dismissed if state remedies have not been exhausted as to all of the federal court claims"); *McGrew v. Texas Bd. Of Pardons & Paroles*, 47 F.3d 158, 161 (5th Cir. 1995) ("McGrew's allegations reflect that he has not exhausted his state remedies and, therefore, insofar as his complaint can be construed as seeking habeas relief, it must be dismissed for failure to exhaust").

4. Moreover, no other circuit besides the Ninth Circuit has held that a district court must advise a habeas petitioner that his federal claims may be time-barred if he chooses to dismiss a mixed petition and return to state court to exhaust his newly-presented claims. This mandated advisement "fails to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired." *Ford v. Hubbard*, 330 F.3d at 1108 (Silverman, J., dissenting). Indeed, the absence of adequate documentation in that regard may very well result in misadvisement. Other problems abound:

> Numerous factors can affect a petitioner's decision to delete unexhausted claims and proceed with an amended petition, rather than accept dismissal without prejudice so that unexhausted claims can be pursued in state court. For example, the meritoriousness of the unexhausted claims is an extremely important factor; so is the fact that the failure-to-exhaust might foreclose those claims forever. The availability of key witnesses is another

> factor. The statute of limitations is only one element in the equation, and a fact-intensive one at that. Leaving aside the question of the proper role of the court as a neutral arbiter, the district court simply is in no position to identify all of the considerations that pertain. I respectfully suggest that it is the office of the court to fairly and impartially decide the case before it, not to act as the petitioner's paralegal.

Id. at 1109 (Silverman, J., dissenting).

The Ninth Circuit's holding imposes an unwarranted burden upon district courts, and blurs the distinction between impartial decision-making and advocacy. This Court has never required any warnings or advisements regarding the AEDPA's limitation period, nor has it ever held that their absence renders the dismissal of a mixed petition erroneous, as the Ninth Circuit concludes. *See Duncan v. Walker*, 533 U.S. at 178-79.

5. The Ninth Circuit's requirement that petitioners be advised of the AEDPA's limitation period also is inconsistent with the Second Circuit's holding in *Warren v. Garvin*, 219 F.3d 111 (2d Cir. 2000). There, the petitioner argued that his second habeas petition should be treated as a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and regarded as a continuation of his first petition. *Id.* at 114. The petitioner maintained that relief was warranted because the district court in the first proceeding did not warn him that the AEDPA's limitation period would preclude him from refiling. *Id.* In rejecting that argument, the Second Circuit held:

> Warren contends that he is entitled to relief "because [he] was never informed of the effect of a dismissal on his ability to bring a subsequent petition." However, appellant knew of the 1-year limitations period for habeas petitions under the AEDPA, and his failure to timely refile (or to pursue his additional

> state claims) is merely garden variety neglect. Because "excusable neglect" is a ground for relief under Rule 60(b)(1), it cannot be considered under Rule 60(b)(6). Therefore, Warren's petition, even if treated as a motion under Rule 60(b), must be denied.

Id. at 114-15; *see also Zarvela v. Artuz*, 254 F.3d 374, 378, 380 (2d Cir. 2001) (citing *Warren*).

Resolution of the conflict between the Ninth Circuit and the Second, Fifth, and Eighth Circuits is vital to the proper and consistent application of this Court's precedent.

II.

The Ninth Circuit has acted inconsistently with this Court's precedent on equitable tolling, total exhaustion, and the period of limitation, by holding that the period should be equitably tolled if a prior district court did not employ a stay-and-abey procedure before dismissing a mixed federal habeas corpus petition.

Certiorari should be granted, also, because the Ninth Circuit's holding on equitable tolling runs afoul of this Court's precedent. Given the limitation period's detailed statutory provisions for enlarging and tolling the period of limitation, this Court's case law compels the conclusion that Congress did not contemplate equitable tolling for AEDPA. Moreover, granting equitable tolling because a prior district court did not follow a stay-and-abey procedure disregards this Court's unequivocal directive that a habeas petitioner must go to state court *before* going to federal court.

1. At the outset, there is an important question of whether equitable tolling of the AEDPA's period of limitation ever should be allowed. In *Duncan v. Walker*, this Court held that a prior federal habeas corpus petition did not *statutorily* toll the period of limitation. *Duncan v. Walker*, 533 U.S. at 181-82.

In doing so, this Court acknowledged the question of whether a prior federal habeas corpus petition can *equitably* toll the limitation period. *Duncan v. Walker*, 533 U.S. at 181. Nonetheless, a majority of this Court declined to decide the question in *Duncan*, noting that the prior district court dismissed the petition before the limitation period expired. *Id.* at 181-82. In two separate concurring opinions, Justices Souter and Stevens granted that *Rose v. Lundy* required dismissal of mixed petitions but indicated that, after the advent of AEDPA, equitable tolling could potentially apply if a prior federal court dismissed a mixed petition after the limitation period expired instead of staying and abeying it. *Id.* at 182 (Souter, J., concurring); *id.* at 182-83 (Stevens, J., concurring). This case presents the question left open in *Duncan* because the Ninth Circuit awarded equitable tolling due to the prior federal court dismissing the mixed petition after the limitation period expired.

2. The Ninth Circuit's finding that equitable tolling exists under AEDPA is inconsistent with this Court's rationale in other cases. In *United States v. Beggerly*, 524 U.S. 38 (1998), this Court held there was no equitable tolling available as to the Quiet Title Act, 28 U.S.C. § 2409a, because Congress had already accounted for equitable tolling by "providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,'" and, that under these circumstances, "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *Beggerly*, 524 U.S. at 48.

Similarly, this Court in *Lampf v. Gilbertson*, 501 U.S. 350 (1991), held that Congress did not intend the statute of limitations of 15 U.S.C. § 78j(b), pertaining to the Securities and Exchange Commission, to be equitably tolled. *Lampf*, 501 U.S. at 363. This Court reasoned, in part, that "[t]he 1-year period, by its terms, begins after discovery of the facts constituting the violation, mak[ing] tolling unnecessary." *Id.*; *see also United States v. Brockamp*, 519 U.S. 347, 351-52 (1997); *Lonchar v. Thomas*, 517 U.S. 314, 323, 332 (1996).

Like the statutes at issue in *Beggerly* and *Lampf*, the AEDPA already contains a provision contemplating this specific equitable situation, 28 U.S.C. § 2244(d)(1)(D), "which postpones the running of the one-year limitation for the filing of a petition for habeas corpus to 'the [earliest] date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.'" *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999). Furthermore, Congress detailed two other equitable conditions for enlarging the period and also specified prerequisites for statutory tolling. 28 U.S.C. § 2244(d)(1)(B), (C), (2). As the First Circuit has recently explained in doubting the existence of equitable tolling in the AEDPA:

> [S]ection 2244(d) comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions. Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort. [Citation.] AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up.

David v. Hall, 318 F.3d 343, 346 (1st Cir. 2003); *see also Taliani*, 189 F.3d at 598 ("[g]iven this and other express tolling provisions (28 U.S.C. §§ 2244(d)(1)(B), (C), (2)), it is unclear what room remains for importing the judge-made doctrine of equitable tolling"). Accordingly, extension of the one-year period set forth in the AEDPA by equitable tolling is "unwarranted," *see Beggerly*, 524 U.S. at 49, and "unnecessary," *see Lampf*, 501 U.S. at 363.

3. Even assuming equitable tolling is available under the AEDPA, the Ninth Circuit's holding that it is justified based on an earlier, mixed petition dismissed after the period expires, contradicts the reasoning in *Duncan v. Walker*, 533 U.S. 167,

and functionally eviscerates *Duncan*'s holding for the greater amount of timeliness cases dealing with prior federal petitions. Just as with statutory tolling, permitting equitable tolling for dismissed prior, mixed habeas corpus petitions:

> would furnish little incentive for individuals to seek relief from the state courts before filing federal habeas petitions. . . . [It would also] further undermine the interest in finality by creating more potential for delay in the adjudication of federal law claims.

Id. at 180.

Furthermore, this Court in *Duncan* "observed that 'strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition.'" *Duncan*, 533 U.S. at 180 (quoting *Rose v. Lundy*, 455 U.S. at 520). Requiring equitable tolling because a prior district court did not utilize a stay-and-abey procedure before dismissing a mixed petition:

> would dilute the efficacy of the exhaustion requirement in achieving this objective. Tolling the limitation period for a federal habeas petition that is dismissed without prejudice would thus create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves.

Id. The Ninth Circuit's finding of equitable tolling therefore "fails to account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan,* 533 U.S. at 181.

The AEDPA's exhaustion and timeliness provisions are synchronized to "encourage litigants *first* to exhaust all state

remedies and *then* to file their federal habeas petitions as soon as possible." *Duncan*, 533 U.S. at 181. The Ninth Circuit's equitable-tolling holding, on the other hand, flies in the face of this Court's interpretation of the exhaustion requirement and the period of limitation, by encouraging litigants *first* to file their federal habeas petitions and *then* to exhaust all state remedies. *See Biggs v. Duncan*, ___ F.3d ___, 2003 WL 21911087, * 3 n.2 (9th Cir. Aug. 12, 2003) (01-15917).

4. Finally, equitable tolling would not apply here even under the equitable tolling test laid down by the Ninth Circuit, a test similar to that of other circuits that have articulated one for the period of limitation.[4/] Under this test, equitable tolling of the limitation period is only present if "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999); *see Smaldone v. Sendowski*, 273 F.3d 133, 138 (2d Cir. 2001) (equitable tolling available if the petitioner faced an extraordinary circumstance beyond his control that prevented him from timely filing the petition); *York v. Galetka*, 263 F.3d 1135, 1142-43 (10th Cir. 2001) (equitable tolling available if

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4. Some circuits have decided that the AEDPA's period of limitation can be equitably tolled. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Sandvik v. United States*, 177 F.3d 1269, 2171-72 (11th Cir. 1999); *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998); *Miller v. New Jersey Department of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997). Other circuits have avoided deciding equitable tolling's existence in AEDPA by denying equitable tolling claims on their merits. *Lattimore v. Dubois*, 311 F.3d 46, 55 (1st Cir. 2002); *United States v. Saro*, 252 F.3d 449, 453-54 (D.C. Cir. 2000). The Seventh Circuit has sometimes found its availability unclear, *Johnson v. McCaughtrey*, 265 F.3d 559, 565-66 (7th Cir. 2001); *Owens v. Boyd*, 235 F.3d 356, 360 (7th Cir. 2000), and other times assumed its availability without much explanation, *Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002); *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000).

the petitioner diligently pursues his claims and shows that his failure to file on time was the result of extraordinary circumstances beyond his control); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (equitable tolling available if there either was governmental interference with the prisoner's attempt to file or any other circumstance beyond the prisoner's control that caused his untimely filing).

The first habeas petition that Brambles filed in federal court was mixed. It was by no means an extraordinary circumstance for the prior district court to follow this Court's procedure in *Rose v. Lundy* mandating dismissal of mixed petitions, especially when the Ninth Circuit had not yet required a different, stay-and-abey procedure. Furthermore, nothing happened beyond Brambles's control. There is no allegation he did not have adequate resources or the ability to file a timely, exhausted petition in the first place and nothing the prior district court did prevented Brambles from doing so. In addition, the prior district court's procedure did not make it impossible for Brambles to file a timely petition. If the prior district court erred in some way, it was incumbent upon Brambles to appeal *that* judgment. His failure to do so, along with the 85 days between his first and second federal petitions when no state or federal application was pending, demonstrated a lack of diligence inconsistent with equitable tolling. *See* App. A13; *Guillory v. Roe*, 329 F.3d 1015, 1018 & n.1 (9th Cir. 2003).

Resolving equitable tolling is often time-consuming and fact-intensive. Cases that should be summarily dismissed as barred by the limitation period may nevertheless require substantial analysis and even evidentiary hearings to determine if the period should be equitably tolled. *See, e.g., Griffin v. Rogers*, 308 F.3d 647, 654 (6th Cir. 2002); *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir. 2002); *Hall v. Scott*, 292 F.3d 1264, 1268 (10th Cir. 2002); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001); *Woodward v. Williams*, 263 F.3d 1135, 1143 (10th Cir. 2001); *Whalem/Hunt v. Early*, 233 F.3d 1146, 1147 (9th Cir. 2000); *Valverde v. Stinson*, 224 F.3d 129, 135 (2d Cir.

2000); *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000); *Miller v. New Jersey Dept. of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998) (all remanding for the district courts to further consider whether the petitioners should be granted equitable tolling). Yet despite equitable tolling's transforming effect on the AEDPA's limitation period, this Court has not had the opportunity to provide specific guidance on whether equitable tolling even exists under AEDPA, and, if it does, whether it is justified when a prior district court dismissed a mixed petition without offering to stay and abey the petition pending exhaustion of state remedies. This case presents an opportunity to decide these critical issues.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Dated: August 29, 2003

Respectfully submitted,

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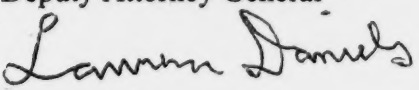

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL D. BRAMBLES, *Petitioner-Appellant*, v. W. A. DUNCAN, Warden; C. A. TERHUNE, Director, California Department of Corrections, *Respondents-Appellees*.	No. 01-55716 D.C. No. CV-00-08180-MMM OPINION

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted
September 12, 2002—Pasadena, California

Filed June 3, 2003

Before: David R. Thompson and Johnnie B. Rawlinson,
Circuit Judges, and William W Schwarzer,*
Senior District Judge.

Opinion by Judge Thompson;
Concurrence by Judge Rawlinson

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*The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court and remanded. The court held that a habeas corpus petition that is untimely will be deemed timely under the doctrine of equitable tolling when the district court mistakenly advised the defendant that an earlier, timely filed petition containing exhausted and unexhausted claims could be dismissed without prejudice, and failed to advise the defendant of the "stay and abey" option.

Appellant Michael Brambles, who was serving a 102-year prison sentence in California, filed a habeas corpus petition containing one exhausted and two unexhausted claims. The district court advised Brambles that he had two options: either dismiss the unexhausted claims or dismiss the entire petition without prejudice. Based on this advice, Brambles moved for dismissal of the entire petition without prejudice. When the district court granted his motion for dismissal, the one-year statute of limitations of the Antiterrorism and Effective Death Penalty Act (AEDPA) had already expired. After exhausting his state claims, Brambles returned to federal district court and filed a petition containing all three claims. The district court dismissed the petition with prejudice, finding that it was time-barred.

Brambles appealed, arguing that the statute of limitations should be equitably tolled.

[1] The statute of limitations had to be equitably tolled as to Brambles's second petition because the district court mistakenly advised him that he could dismiss his first petition

without prejudice. In fact, the first dismissal was with prejudice, since the statute of limitations under AEDPA had already expired. **[2]** The district court should have informed Brambles, who was acting pro se, that the dismissal of his first petition would effectively be with prejudice unless he could establish that the limitations period was equitably tolled. The district court also should have informed Brambles about the "stay and abey" process, by which a defendant may dismiss the unexhausted claims, move to stay proceedings in federal court on the exhausted claim, diligently exhaust the unexhausted claims, then return to federal court and move to amend the petition to include all exhausted claims. **[3]** The district court's failure to so inform Brambles constituted prejudicial error, since it deprived him of his opportunity to make a reasonable choice.

[4] The one-year statute of limitations of AEDPA may be equitably tolled if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time. **[5]** The district court's misadvisements were circumstances beyond Brambles's control and equitable tolling applied. **[6]** Further, equitable tolling applied to render all three of Brambles's claims timely. **[7]** It would be patently unfair, in light of the district court's error, to conclude that Brambles was limited to presenting only the exhausted claim from his first petition. Had he been properly informed of his options, Brambles almost certainly would have chosen to delete his unexhausted claims and avail himself of the "stay and abey" process. **[8]** In addition, all three of Brambles's claims could be considered on the merits under Federal Rule of Civil Procedure 15(c), by which the second petition could be amended to relate back to and preserve the filing date of the improperly dismissed, initial petition. **[9]** Finally, Brambles exercised reasonable diligence in exhausting his two state claims and returning to federal court.

Judge Rawlinson concurred in the result only, stating that

it was dictated by judicial precedents.

COUNSEL

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Lawrence M. Daniels, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

THOMPSON, Circuit Judge:

Michael D. Brambles appeals the district court's dismissal of his habeas corpus petition as time-barred under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d).

Brambles filed an earlier petition that was timely, but it included one exhausted and two unexhausted claims. The district court told Brambles he could either dismiss the unexhausted claims or dismiss the whole petition "without prejudice to any right [he] may have to file a new petition once available state remedies are exhausted as to all claims." The court also warned Brambles, who was then pro se, that "recently amended 28 U.S.C. § 2244 limits the time period within which a petition may be filed." In fact, the one-year period within which to file a federal petition had already expired by the time the district court made this ruling.[1/] Thus, if Brambles dismissed his petition, his right to seek federal habeas review

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1. It is undisputed that the one-year period was not extended by statutory tolling. 28 U.S.C. § 2244(d)(2).

would be lost unless he could establish equitable tolling. *See Ford v. Hubbard*, 2003 WL 21095654, at *11 (9th Cir. May 15, 2003). But the district court did not explain that to him. Nor did the court inform him that he had a third option: he could dismiss the unexhausted claims, move to stay proceedings in federal court on his exhausted claim and, if that motion were granted, exhaust the dismissed claims in state court; then return to federal court and move to amend his petition to include all exhausted claims (the "stay and abey" process). *See Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003).

Relying on what the district court told him, and unaware of the consequences of dismissing his timely petition in its entirety, Brambles chose to have the entire petition dismissed "without prejudice." He then went back to state court, exhausted his two unexhausted claims, and thereafter returned to federal court where he filed his present petition which includes all three claims. The district court dismissed the petition with prejudice, finding that it was time-barred.

We reverse the district court's dismissal. We conclude the court misled the pro se Brambles by telling him that he could dismiss his federal petition "without prejudice" without explaining to him the consequences of such a dismissal, and by failing to advise him of the "stay and abey" option.[2/] This constituted prejudicial error and an extraordinary circumstance beyond Brambles's control. Applying the doctrine of equitable tolling, we conclude that Brambles's present federal petition is

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2. At the time the district court gave Brambles the options of dismissing his entire petition "without prejudice" and returning to state court, or dismissing the unexhausted claims and remaining in federal court, we had not filed our opinions in *Ford* or *Kelly*. Nor had we filed either opinion when the district court later dismissed Brambles's present petition "with prejudice."

timely.

I. JURISDICTION

The district court had jurisdiction to consider Brambles's habeas petition pursuant to 28 U.S.C. § 2254. We have jurisdiction to review the district court's dismissal of the petition pursuant to 28 U.S.C. §§ 1291 and 2253.

II. BACKGROUND

On July 11, 1996, a jury convicted Brambles in California Superior Court of several crimes including forcible rape, robbery, and assault with a firearm. The trial court sentenced him to 102 years in prison. Brambles appealed to the California Court of Appeal, which affirmed both his conviction and sentence. The California Supreme Court denied review on September 2, 1998. Brambles did not file a petition for certiorari with the United States Supreme Court.

On June 29, 1999, Brambles timely filed, pro se, a habeas corpus petition ("first petition") in the United States District Court for the Central District of California. Two of the three claims asserted in that petition were unexhausted. The district court, on December 13, 1999, twelve days after the AEDPA's one-year statute of limitations had expired, ordered Brambles to:

> choose one of the following options [by December 31, 1999]:
>
> 1. Dismiss Grounds one and two, the unexhausted claims. (If petitioner chooses this option he will have to obtain authorization from the [Federal] Court of Appeals before filing another petition, pursuant to 28 U.S.C. § 2244.)

> 2. Request this Court to dismiss the current petition without prejudice to any right petitioner may have to file a new petition once available state remedies are exhausted as to all claims. **(Petitioner is cautioned that recently amended 28 U.S.C. § 2244 limits the time period within which a petition may be filed.)** (emphasis in original).

On December 27, 1999, Brambles made his choice. He requested that "the court grant petitioner option #2[.]" Pursuant to that request, on January 20, 2000, the district court dismissed the entire first petition "without prejudice." On April 11, 2000, Brambles filed, pro se, a habeas corpus petition in the California Supreme Court. On June 28, 2000, the California Supreme Court summarily denied the petition. Having exhausted his state remedies, Brambles returned to federal court and on July 31, 2000 filed, pro se, his present habeas petition ("second petition"). He asserted the same three claims in his second petition that he had asserted in his first petition.

The state contended that the second petition was time-barred under the AEDPA's one-year statute of limitations. Brambles argued that the second petition was timely because the district court had misleadingly offered him the option of dismissing his first petition without prejudice. A magistrate judge, assuming that Brambles was contending that the limitations period should be equitably tolled, concluded in his report and recommendation that equitable tolling did not apply and thus the second petition was untimely. The district court adopted the magistrate judge's report and recommendation, and dismissed the second petition with prejudice as time-barred.

Brambles filed a notice of appeal and applied for a certificate of appealability ("COA"). The district court denied that request, but this court issued a COA on the following issue: "Was the [second] petition timely filed?"

III. STANDARD OF REVIEW

We review de novo the dismissal of Brambles's second petition as time-barred. *Herbst v. Cook*, 260 F.3d 1039, 1042 (9th Cir. 1999). If the facts underlying a claim for equitable tolling are undisputed, as they are here, we also review de novo whether the statute of limitations should be equitably tolled. *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).

IV. DISCUSSION

The AEDPA requires state prisoners to seek federal habeas corpus relief within one-year after their convictions become final. 28 U.S.C. § 2244(d). Brambles's conviction became final on December 1, 1998, ninety-days after the California Supreme Court denied his petition for direct review. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999) ("hold[ing] that the period of 'direct review' in 28 U.S.C. § 2244(d)(1)(A) includes the [ninety-day] period within which a petitioner can file a petition for a writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files such a petition."). Because the one-year limitations period began to run on the next day, and no period of statutory tolling intervened, Brambles's federal habeas petition would have been untimely if filed after December 1, 1999. *Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002). Brambles timely filed his first petition on June 29, 1999, but, as stated above, that petition was dismissed. He did not file his second petition until July 31, 2000. Thus, Brambles's second petition is time-barred unless it relates back to the filing date of the first petition under Federal Rule of Civil Procedure 15(c) ("Rule 15(c)"), which we discuss hereafter, or unless the statute of limitations is equitably tolled.

[1] Brambles contends that the statute of limitations should be equitably tolled because the district court

misleadingly told him that he could dismiss his first petition *without prejudice*. We agree. Because the statute of limitations under the AEDPA had already expired at the time the district court dismissed Brambles's first petition, for all practical purposes that dismissal was a dismissal with prejudice. *See Ford*, 2003WL 21095654, at *11. *See also Tillema v. Long*, 253 F.3d 494, 503-04 (9th Cir. 2001) (concluding that because the dismissal "would, barring some other circumstance, have literally and immediately extinguished [the petitioner's] right to federal habeas review [,] . . . [it could not] accurately be said that the dismissal of [the] petition was, as the court's order stated, 'without prejudice.'"); *Pension Benefit Guar. Corp. v. Carter & Tillery Enter.*, 133 F.3d 1183, 1187 (9th Cir. 1998) (noting that "[w]hile the dismissal was without prejudice, given the statute of limitations problem, the dismissal was effectively with prejudice."); *United States v. Kenner Gen. Contractors, Inc.*, 764 F.2d 707, 709 (9th Cir. 1985) (finding that "[a]lthough the dismissal was nominally 'without prejudice,' it was effectively 'with prejudice' because a new action would be barred by the applicable statute of limitations."), *superceded by rule as stated in In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001).

[2] The district court should have informed the pro se Brambles that the dismissal of his first petition, although ostensibly without prejudice, would effectively be with prejudice unless he could establish that the limitations period was equitably tolled. *Ford*, 2003 WL 21095654, at *11; *Valerio v. Crawford*, 306 F.3d 742, 770-71 (9th Cir. 2002) (en banc); *Kelly*, 315 F.3d at 1070. The district court also should have informed Brambles about the stay and abey process. *Kelly*, 315 F.3d at 1070-71; *Calderon v. Untied States Dist. Court*, 144 F.3d 618, 620 (9th Cir. 1998). The district court's statement that the AEDPA "limits the time period within which a petition may be filed" was not sufficient. As a result, the district court committed prejudicial error.

[3] This conclusion is compelled by our recent decision in *Ford*. There, Ford had timely filed a mixed petition before expiration of the one-year limitations period prescribed by the AEDPA. *Ford*, 2003 WL 21095654, at *11. After the statute of limitations had run, the district court informed Ford that he could either delete his unexhausted claims or dismiss the petition without prejudice and return to state court to exhaust his claims. *Id.* Ford elected to dismiss his petition without prejudice and exhaust his unexhausted claims. When Ford later returned to federal court, the district court dismissed his second petition with prejudice as time-barred. *Id.* In reversing the district court's dismissal of Ford's second petition, we concluded that the court "erred when it failed to inform Ford that, on the face of the [first petition], he would be time-barred under the AEDPA on all of his claims if he either failed to amend his petition or chose the option of dismissing them and returning to state court to exhaust the unexhausted claims." *Id.* We further stated that "[b]ecause the district court's failure fairly or fully to explain the consequences of the options it presented to Ford deprived him of the opportunity to make a meaningful choice, and as a result caused the district court to conclude that all of his claims were time-barred, . . . the failure constituted prejudicial error." *Id.* As in *Ford*, the error here was also prejudicial. We next consider whether this prejudicial error entitles Brambles to equitable tolling.

[4] The one-year statute of limitations prescribed in the AEDPA may be equitably tolled if "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miles*, 187 F.3d at 1107. "In spite of the 'high hurdle' to the application of equitable tolling," we have found that it applies "in a number of circumstances." *Corjasso*, 278 F.3d at 877. For example, we have held that the limitations period may be equitably tolled if a court's erroneous dismissal of a habeas petition contributes or would contribute to the untimeliness of a later filed petition by the same prisoner. *See,*

e.g., Corjasso, 278 F.3d at 878 (holding that equitable tolling applied when the district court erroneously dismissed a pro se prisoner's first petition); *Calderon v. United States Dist. Court*, 163 F.3d 530, 541-42 (9th Cir. 1998) (determining that the improper dismissal of a petitioner's habeas petition "presents an independent ground to toll the statute of limitations.").

[5] Here, Brambles's first petition, although containing two unexhausted claims, was timely filed. He could have proceeded in the district court on that petition, stripped of its unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 520 (1982). Indeed, the district court gave him that option. The court led Brambles to believe, however, that by dismissing his entire first petition without prejudice he could exhaust his unexhausted claims in state court and then return to federal court where he could pursue all three claims. This option obviously was the more appealing, and not surprisingly was the one Brambles chose. Brambles was led to make that choice by the district court's prejudicial error in failing to explain the consequences of making it. The district court also failed to inform Brambles that he could pursue the stay and abey process. These errors resulted in an erroneously dismissed first petition and contributed to an untimely second petition which could have been timely had the district court not erred in its dismissal of the first petition. These were circumstances beyond Brambles's control and equitable tolling applies.

[6] Having concluded that equitable tolling applies, we must decide whether it applies only to the one claim in Brambles's first petition that he had exhausted, or whether it also applies to the other two claims that he subsequently exhausted. We conclude that equitable tolling applies to render all three claims timely.

[7] It would be patently unfair, in light of the district court's error, to conclude that Brambles is limited to presenting

only the exhausted claim from his first petition. Had he been properly informed of his options, Brambles almost certainly would have chosen to delete his unexhausted claims and avail himself of the "stay and abey" process. As we noted in *Kelly*, 315 F.3d at 1070, "district court[s] must consider the alternative of staying the petition after dismissal of unexhausted claims, in order to permit Petitioner to exhaust those claims and then add them by amendment to his stayed federal petition." We further noted that "[t]he exercise of discretion to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year limitation period imposed by AEDPA." *Id.*

Permitting Brambles to present the initially unexhausted (but now exhausted) claims is also consistent with the decisions of several of our sister circuits. *Nowaczyk v. Warden, N.H. State Prison*, 299 F.3d 69, 79 (1st Cir. 2002) (recognizing the "growing consensus that a stay is *required* when dismissal could jeopardize the petitioner's ability to obtain federal review.") (emphasis in original); *Zarvela v. Artuz*, 254 F.3d 374, 380-83 (2d Cir. 2001) (holding that "[a]lthough a district court would generally have discretion whether to stay the exhausted claims of a mixed petition or dismiss the entire petition, outright dismissal was not appropriate for Zarvela because, with so little time remaining on his statutory one-year limitations period, a complete dismissal 'jeopardize[d] the timeliness of a collateral attack.'") (quoting *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000)); *Newell v. Hanks*, 283 F.3d 827, 834-35 (7th Cir. 2002) (same).

[8] Finally, all three of Brambles's claims could be considered on the merits under Rule 15(c). "[A] pro se habeas petitioner who files a mixed petition that is improperly dismissed by the district court, and who then (following the district court's erroneous legal statements) returns to state court

to exhaust his unexhausted claims and subsequently refiles a second petition without unreasonable delay, may employ the amendment procedures of [Rule 15(c)] to have the second petition relate back to and preserve the filing date of the improperly-dismissed initial petition." *Ford*, 2003 WL 21095654, at *12.

[9] By holding that all three claims in the second petition are timely, we put Brambles in the position he likely would have been in absent the district court's erroneous dismissal of the first petition. In reaching this decision, we conclude that Brambles exercised reasonable diligence in exhausting his two claims and returning to federal court. *See Allen v. Lewis*, 255 F.3d 798, 800-801 (9th Cir. 2001) (stating that "[i]f the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken."). *Cf. Anthony v. Cambra*, 236 F.3d 568, 577 (9th Cir. 2000) (noting that, under Rule 15(c), the district court may deny a petitioner leave to amend if there has been "undue delay, bad faith, or dilatory motive."). In the present case, excluding the time Brambles's habeas petition was pending in state court, it took him 85 days to exhaust those claims and return to federal court. *See Bunny v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001) (noting that "[a] decision of the [California] Supreme Court becomes final 30 days after filing."); 28 U.S.C. § 2244(d) (limitations period stayed while a petition is pending in state court). Taking 85 days, apart from excludable "state time," to exhaust state remedies does not demonstrate a lack of diligence by Brambles. *Smith v. Ratelle*, 323 F.3d 813, 815, 819 (9th Cir. 2003) (93 days assumed (but not decided) to be reasonably diligent); *cf. Zarvela*, 254 F.3d at 381 (60 days not unreasonable).

V. CONCLUSION

We conclude that equitable tolling applies and renders Brambles's second petition, containing all three of his claims, timely. We reverse the judgment of the district court and remand for consideration of those claims on the merits.

REVERSED and REMANDED.

RAWLINSON, Circuit Judge, concurring:

In concur in the result because, and only because, the outcome reflected in the majority opinion is dictated by the precedential cases of *Ford v. Hubbard*, 2003 WL 21095654 *11 (9th Cir. May 15, 2003) and *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003).

FILED
DEC 13 2000
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION OF SANTA ANA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL D. BRAMBLES, Petitioner, v. W.A. DUNCAN, Warden, etc., et al., Respondents.	Case No. CV 00-08180-MMM (EE) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Margaret M. Morrow, United States District Judge, pursuant to 28 U.S.C. § 636.

Petitioner is a state prisoner. He filed the present petition for writ of habeas corpus on July 31, 2000. Because the petition is time-barred by the applicable 1-year statute of limitations, the petition should be dismissed.

In 1996, petitioner was convicted of 18 counts of robbery, 1 count of rape, and 4 counts of forcible oral copulation, among other things. He was sentenced to 102 years in state prison. (Answer, exh. A-10 - A-53.) The California Court of Appeal affirmed the conviction and sentence (while modifying the amount of the restitution fine imposed) on June 3, 1998. (*Id.* at

exh. C.) The California Supreme Court denied review on September 2, 1998. (*Id.* at exh. D.)

On July 31, 2000, petitioner filed the instant petition. Respondent filed an answer to the petition contending that the petition is time-barred by the 1-year statute of limitations set out in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). Petitioner filed a traverse. The petition is now ready for decision.

The petition should be dismissed. The AEDPA's statute of limitations applies to petitioner's presentation of claims in this Court. *Calderon v. U.S. District Court (Beeler)*, 128 F.3d 1283, 1286-1287 (9th Cir. 1997), *as amended on denial of rhg. and rhg. en banc, cert. denied*, 522 U.S. 1099 (1998), *overruled on different grounds in Calderon v. U.S. District Court*, 163 F.3d 530 (9th Cir. 1998), *cert. denied*, 523 U.S. 1063 (1999). In petitioner's case, the conclusion of direct review occurred on December 1, 1998, 90 days after the petition for review was denied on September 2, 1998. (Rule 13(1), U.S. Sup. Ct. Rules.) Accordingly, petitioner had until November 30, 1999 to file his federal habeas petition. *Id.* As set out above, petitioner did not file this federal petition until July 21, 2000, almost 8 months too late.[1/]

Petitioner objects to dismissal based on the fact that his previous federal habeas petition was illegally dismissed and that he was improperly required to return to state court to exhaust state remedies regarding 2 of his claims. (Traverse, pp. 8-20.) However, in the previous federal case (CV 99-6676-MMM (EE)), petitioner was given the option of *either* dismissing the unexhausted claims and proceeding with those that were

---

1. Petitioner did not even file his petition for writ of habeas corpus in the California Supreme Court until April 11, 2000, more than 4 months after the federal statute of limitations had expired on November 30, 1999. (*See* Answer, exhs. G and H.) Thus, the pendency of that petition could not toll the already-expired limitations period.

properly presented *or* dismissing the petition "without prejudice to any right petitioner may have to file a new petition once available state remedies are exhausted as to all claims." The order cautioned petitioner about the possible implications of the AEDPA's 1-year statute of limitations. (*See* order filed December 13, 1999 at Answer, pp. F-204 - F-206.) Petitioner chose "dismissal of the current petition without prejudice to any right petitioner may have to file a new petition once available state remedies are exhausted as to all claims." (Answer, exh. I, p. I-292.) If indeed petitioner objected to dismissal of the petition despite his own election to do so, he should have addressed that objection by appealing the judgment in that case.

Petitioner also contends that the 1-year statute of limitations violates the Suspension Clause of the U.S. Constitution. (Traverse, pp. 20-23.) The contention essentially amounts to an argument that a statute of limitations can never be used to bar habeas claims. This argument is meritless. The object of the AEDPA's statute of limitations is to place finite restrictions upon the time within which a petitioner may file a petition in federal court. *See Calderon v. U.S. District Court (Beeler)*, 128 F.3d 1283, 1286 (9th Cir. 1997), *cert. denied*, 522 U.S. 1099 (1998) ("Prior to the AEDPA's enactment, state prisoners had almost unfettered discretion in deciding when to file a federal habeas petition . . . [The] AEDPA dramatically changed this landscape, shortening the time for filing a federal habeas petition to one year."). The AEDPA's 1-year statute of limitations does not act to suspend the writ, but serves the legitimate goal of halting unacceptable delay by speeding up the habeas process. *Id.* at 1288.

Petitioner also contends that he should be entitled to his day in federal court. (Traverse, pp. 24-27.) The court construes this as a request that the statute of limitations be equitably tolled in his case. However, equitable tolling is applied only in rare situations:

> Federal courts have applied the doctrine of equitable tolling in two generally distinct kinds of situations. In

> the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiff's control made it impossible to file the claims on time.

Alvarez-Machain v. U.S., 107 F.3d 696, 701 (9th Cir. 1996) (quoting *Seattle Audubon Soc. V. Robertson*, 931 F.2d 590, 595 (9th Cir. 1991)).

Petitioner alleges no wrongful conduct on the part of respondents that prevented him from filing sooner. Nor does petitioner make any showing that extraordinary circumstances rendered it "impossible" for him to file his petition on time. As stated above, petitioner did not file his first petition for collateral relief in state court until the 1-year statute had already elapsed. Petitioner makes no attempt to show that it was impossible for him to proceed sooner in seeking collateral review. Moreover, ignorance of the statute of limitations does not constitute an extraordinary circumstance which warrant equitable tolling. *Fadayiro v. United States*, 30 F.Supp.2d 772 (D.N.J. 1998) (ignorance of the law is no excuse).

Because the 1-year statute of limitations had already expired when petitioner filed the present petition in this Court, the petition is time-barred.

Based on the foregoing, IT IS RECOMMENDED that the Court accept and adopt the findings and recommendations herein, and dismiss the petition with prejudice.

Dated: December 12, 2000

/S/

Elgin Edwards
United States Magistrate Judge

FILED
FEB 20 2001
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION OF SANTA ANA
BY /S/ DEPUTY

ENTERED
FEB 20 2001
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CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL D. BRAMBLES, Petitioner, v. W.A. DUNCAN, Warden, etc., et al., Respondents.	Case No. CV 00-08180-MMM (EE) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Final Report and Recommendation and the attached Report and Recommendation ("reports") are submitted to the Honorable Margaret M. Morrow, United States District Judge, pursuant to 28 U.S.C. § 636.

On December 13, 2000, the Clerk filed Report and Recommendation of United States Magistrate Judge, together

with a notice of filing thereof. Both were served on the parties.

Petitioner has timely filed objections to the report and recommendation. Have carefully considered the objections, the magistrate judge finds no reason set forth for changing the recommendation in any respect. The objections largely reiterate the arguments made by petitioner in his petition and traverse, which were already considered by the magistrate judge. In addition, petitioner objects based on his assumption that the statute of limitations was tolled during the period that he had a previous *federal* habeas petition pending in this Court. He is mistaken. *Jiminez v. Rice*, 222 F.3d 1210, 1212-1214 (9th Cir. 2000) (holding that section 2244(d)(2) does not toll the AEDPA limitations period while a federal habeas petition is pending).

IT IS THEREFORE THE FINAL RECOMMENDATION that the Court accept and adopt the findings and recommendations in these reports and dismiss the petition with prejudice.

Dated: January 12 2001

/S/

Elgin Edwards
United States Magistrate Judge

FILED
FEB 20 2001
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION OF SANTA ANA
BY /S/ DEPUTY

ENTERED
FEB 20 2001
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL D. BRAMBLES, Petitioner, v. W.A. DUNCAN, Warden, etc., et al., Respondents.	Case No. CV 00-08180-MMM (EE) ORDER ACCEPTING AND ADOPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the petition and all of the records and files herein. The Court accepts and adopts the findings and recommendations of the United States Magistrate Judge in the reports and recommendations attached hereto ("reports") and orders that judgment be entered dismissing the petition with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the reports, and the Judgment herein on all parties.

Dated: February 14, 2001

/S/

Margaret M. Morrow
United States District Judge

FILED
FEB 20 2001
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION OF SANTA ANA
BY /S/ DEPUTY

ENTERED
FEB 20 2001
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL D. BRAMBLES, Petitioner, v. W.A. DUNCAN, Warden, etc., et al., Respondents.	Case No. CV 00-08180-MMM (EE) JUDGMENT

IT IS ADJUDGED that the petition herein is dismissed with prejudice.

Dated: February 14, 2001

/S/
Margaret M. Morrow
United States District Judge

FILED
DEC 13 1999
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY /S/ DEPUTY

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.
DATED Dec. 13, 1999
/S/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL D. BRAMBLES, Plaintiff, v. CARL LARSON, Warden, etc., et al., Defendants.	Case No. CV 99-6676-MMM (EE) ORDER

Petitioner filed a petition for writ of habeas corpus on June 29, 1999. Respondent filed an Answer on October 21, 1999, and petitioner filed a traverse. A review of the state appellate record shows that petitioner has not exhausted available state

remedies as to the following claims presented in the petition:

> Ground one: The trial court's refusal to appoint a psychiatric expert to assist counsel in preparing a defense deprived petitioner, an indigent defendant, of his Sixth Amendment right to counsel; and

//

> Ground two: Petitioner's Fourteenth Amendment rights to due process of law [were] violated by the admission of Belle Braglia's hearsay statements to the emergency room physician for the truth of the matters asserted therein denied petitioner a fair trial.

(petition, ¶¶ 10a and 10b.) As to ground one, petitioner failed to present the operative facts alleged here to the California Supreme Court[2], and, as to ground two, petitioner failed to present the federal constitutional theory presented here to the California Supreme Court. (*See* Answer, exh. D., pp. D-162 - D-176.) "A district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims." *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988); *see Rose v. Lundy*, 455 U.S. 509, 522 (1982).

In keeping with the above, petitioner shall choose one of the following options:

1. Dismiss Grounds one and two, the unexhausted claims. (If petitioner chooses this option he will have to obtain authorization from the Court of Appeals before filing another petition, pursuant to 28 U.S.C. § 2244.)

2. Request this Court to dismiss the current petition without prejudice to any right petitioner may have to file a new petition once available state remedies are exhausted as to all claims.

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2. A cross-reference (in a petition to the state Supreme Court) to a Court of Appeals brief does not constitute adequate briefing for exhaustion purposes. *Kibler v. Walters*, ___ F.3d ___, ___, 1999 WL 1080170 (9th Cir. (Wash.) December 2, 1999).

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//

(Petitioner is cautioned that recently amended 28 U.S.C. § 2244 limits the time period within which a petition may be filed.)[3/]

Petitioner shall file and serve a paper setting forth his election of option 1 or option 2 not later than December 31, 1999. **If petitioner does not file a timely response to this**

---

3. 28 U.S.C. § 2244(d)(1) and (2) state: "(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

order, the current petition will be subject to dismissal without prejudice.

Dated: December 9, 1999

/S/

Elgin Edwards
United States Magistrate Judge

FILED
JAN 20 2000
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY /S/ DEPUTY

ENTERED
JAN 20 2000
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL D. BRAMBLES, Petitioner, v. CARL LARSON, Warden, etc., et al , Respondents.	Case No. CV 99-6676-MMM (EE) MEMORANDUM AND ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, a California state prisoner, filed this petition for writ of habeas corpus on June 29, 1999, in which he makes 3 separate claims that his conviction and sentence are illegal. (petition, ¶ 10 and attached pages.) After briefing by respondent, on December 13, 1999, the magistrate judge issued an order stating that petitioner has not exhausted available state

remedies as to Ground one and Ground two of the petition.

The order provided petitioner with the opportunity to choose one of the following options: 1) Dismiss Grounds one and two and enter a judgment on Ground three only, or 2) Request this Court to dismiss the current petition without prejudice to any right petitioner may have to file a new petition once available state remedies are exhausted as to all claims. Petitioner was cautioned that 28 U.S.C. § 2244 limits the time period within which a petition may be filed.

On December 29, 1999, petitioner filed a paper stating that he elected option # 2, dismissal of the current petition without prejudice to any right he may have to file a new petition once available state remedies are exhausted as to all claims. (motion filed December 29, 1999, p. 3.)

Accordingly, the petition is dismissed without prejudice to any right petitioner may have to file a new petition once available state remedies are exhausted as to all claims. Judgment shall be entered accordingly.

Dated: January 14, 2000

/S/
Margaret M. Morrow
United States District Judge

Presented By:

/S/
Elgin Edwards
United States Magistrate Judge

FILED
JAN 20 2000
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY /S/ DEPUTY

ENTERED
JAN 20 2000
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL D. BRAMBLES, Petitioner, v. CARL LARSON, Warden, etc., et al., Respondents.	Case No. CV 99-6676-MMM (EE) JUDGMENT

IT IS ADJUDGED that the petition herein is dismissed.

Dated: January 14, 2000

/S/
Margaret M. Morrow
United States District Judge

ORIGINAL

No. 03-357

Supreme Court, U.S.
FILED
DEC 4 - 2003
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DERRAL G. ADAMS, Warden,; C.A. TERHUNE, Director,
California Department of Corrections,

Petitioners,

v.

MICHAEL D. BRAMBLES,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Michael D. Brambles, asks leave to file the accompanying Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth District, without prepayment of costs and to proceed in forma pauperis, under Rule 39 of the U.S. Supreme Court Rules, and 28 U.S.C. 1915(a). Petitioner was allowed to proceed, in forma pauperis, in the United States Court of Appeals for the Ninth District.

Due to petitioner's indigency, counsel for petitioner was appointed by the United States Court of Appeals for the Ninth

ORIGINAL

District, pursuant to 18 U.S.C. 3006A(d)(6); thus, an affidavit of indigency is unnecessary.

Dated: December 1, 2003

Respectfully submitted,
LAW OFFICES KENNETH M. STERN

BY: _____
KENNETH M. STERN, ATTORNEY
FOR RESPONDENT.

No 03-357

IN THE SUPREME COURT OF THE UNITED STATES

DERRAL G. ADAMS, Warden,; C.A. TERHUNE, Director,
California Department of Corrections,
Petitioners,
v.
MICHAEL D. BRAMBLES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAW OFFICES KENNETH M. STERN
5850 Canoga Avenue
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(818) 716-1101

Attorney for Respondent,
MICHAEL D. BRAMBLES by
appointment of the
Court of Appeals

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SUPREME COURT, U.S.

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BEST AVAILABLE COPY

I. INTRODUCTION.

In this case, respondent, a state prisoner, filed a timely Petition for Writ of Habeas Corpus. The District Court believed that there were some unexhausted state claims in said petition. The District Court, of its own initiative, gave respondent various procedural options, including, dismissing the petitioner, without prejudice, to exhaust the unexhausted state claims; then, refile said petition. However, what the District Court failed to inform respondent was, absent tolling, the statute of limitations had already run; thus, absent tolling, respondent would be barred from pursuing a renewed Petition for Writ of Habeas Corpus, the moment the original petition was dismissed.

Because of the unique facts of this case, different from those cases cited by petitioner, this case is not appropriate for certiorari. In this case, unlike the cases cited by petitioner, it was the District Court who initiated the offer, to respondent, to dismiss the petition, without prejudice, not appellant initiating the request. As respondent had shown in his opening brief, in the ninth Circuit, when the court itself causes a party to act to his detriment, in a habeas corpus statute of limitations context, equitable tolling occurs. As such, in this situation, it cannot be denied that equitable tolling should, as the Court of Appeal recognized, should have properly been allowed.

/ / /

/ / /

II. THE STAY AND ABEY PROCEDURE IS PROPER. AS THE OPINION IN THIS CASE IS CONSISTENT, NOT INCONSISTENT, WITH ROSE V. LUNDY, THERE IS NO NEED FOR THIS COURT TO GRANT CERTIORARI.

Petitioner incorrectly contends that the stay and abey procedure is improper; as, the Opinion in this case is inconsistent with Rose v. Lundy 455 U.S. 509, 102 S. Ct. 1198 (1982). Not only is the opinion not inconsistent with Rose, it is consistent with that case.

Rose concerned the habeas corpus statute, prior to AEDPA. It did not consider problems engendered by the statute of limitations. Rose was concerned with comity with the state, as to exhaustion of remedies. Staying a habeas corpus petition, to exhaust remedies in state court, do nothing to invade comity. Also, staying the habeas corpus proceeding, to exhaust state remedies, does not create problems, as discussed in Rose, of successive petitions or multiple, piecemeal litigation.

Finally, Rose presumes the habeas petitioner would have the procedural ability to dismiss a petition, exhaust remedies, then refile the petition. With the added statute of limitations, that ability, presumed by Rose to exist, can be extinguished, if there is no equitable tolling or the procedure of staying the proceedings while the unexhausted claims are exhausted.

The Supreme Court specifically noted it was dealing with habeas corpus law, based upon statutes existing a that time.

> "our holdings today reflect our interpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies." (Id. at p. 519, 1204.)

Thus, in Rose, the Court was concerned with a statutory scheme

where there was no statute of limitations potentially impeding a habeas corpus petitioner's access to the Court, as occurred herein, and numerous other cases which have run up against the AEDPA. statute of limitations. As such, the Rose court was not concerned with potential problems of the statute of limitations, when it gave its procedural guidelines.

Rose discussed its ruling was to effectuate comity, with the states, so that it would have the first opportunity to correct any constitutional problems.

> " . . . In Ex parte Hawk, 321 U.S. 114, 117 (1944), this Court reiterated that comity was the basis for the exhaustion doctrine: 'it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'[fn7] . . . (Id. at p. 515, 1202.)
>
> "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. (Id. At p. 518, 1203.)
>
> " '... it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 204 (1950). See Duckworth v. Serrano, 454 U.S. 1, 2 (1981) (per curiam) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights"). (Ibid)

The law set-forth in the Opinion, and the procedures set-forth, in no way impinge upon the principles of comity, of which Rose

was concerned. Comity is fully protected and honored.

Rose also noted that the habeas petitioner's right to substantive review were protected, under the statutory scheme then existing, by being able to dismiss and refile. That is frequently going to be impossible, without equitable tolling and the stay procedure, under the new statutory scheme not present when Rose was decided. Rose was based upon the premise that a petitioner would have the ability to dismiss and refile.

> "There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions (STEVENS, J., post, at 550), or **will serve to "trap the unwary pro se prisoner."** (BLACKMUN, J., post, at 530.)(Id. at p. 520, 1204.)
>
> "In sum, because a total exhaustion rule promotes comity and **does not unreasonably impair the prisoner's right to relief,** we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." (Id. at p. 522, 1205.)(emphasis added.)

The stay procedure is wholly consistent with Rose's pronouncement that habeas corpus petitioner's have their day in court. Thus, it is unlikely the Supreme Court would grant Certiorari, based upon Rose.

Castille v. People, 489 U.S. 346 (1989) actually helps respondent. Castille held that denying review of mixed petitions is not jurisdictional. (Id. at p. 349.) In Castille the petition, which sought the right to federally funded counsel for state proceedings, was dismissed because there was no such right, not because of a mixed petition problem. Castille does not say a court may not stay proceedings while exhaustion of state remedies occurs. It does not say when a mixed petition need be dismissed.

Victor v. Hopkins, 90 F.3d 276 (8th Cir.1996), which relies upon Rose, recognizes in extreme cases the court may ignore the dismissal of mixed petition requirement. Herein, such a case certainly exists; as, it was the District Court itself that proffered the dismiss without prejudice, then refile after exhausting issues in state court, procedure. Certainly where the court itself has proffered the procedure, followed by respondent, respondent should not be barred. Victor referenced Rose. But, in Rose, the issue was exhaustion, not tolling or stay of proceedings.

Carmichael v. White, 163 F.3d 919 (8th Cir. 1999) which relied upon Victor, is distinguishable from this action; as, Carmichael uses an incorrect implication from Rose, that there can be no stay and exhaust procedure. Rose never ruled such, nor did Carmichael.

Sterling v. Collins, 57 F.3d 451 (5th Circ. 1995) merely involves whether a federal habeas corpus petitioner has a right to federally appointed counsel to exhaust state remedies in state court. It does not state there can be no stay procedure. That was not even an issue.

III. EQUITABLE TOLLING IS PROPER.

Petitioner claims the Opinion is inconsistent with United States v. Beggerly, 118 S.Ct. 1862 (1998), which petitioner claims rules there may no be equitable tolling of the statute of

limitations.[1] Beggerly merely held there may not equitable tolling if the involved statute specifically precludes such.

> ". . . In our view, the Court of Appeals was wrong in deciding that equitable tolling is available in a QTA suit.
>
> "Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute. United States v. Brockamp, 519 U. S. ___ (1997). Here, the QTA, by providing that the statute of limitations will not begin to run until the plaintiff "knew or should have known of the claim of the United States," has already effectively allowed for equitable tolling. See Irwin v. Department of Veterans Affairs, 498 U. S. 89, 96 (1990) ("We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"). (Id. at p. 1868.)

Herein, 28 U.S.C. 2244 does not specifically, or otherwise, preclude equitable tolling. Furthermore, equitable tolling was applied by the Ninth Circuit in Calderon v. U.S.Dist. Crt. For the Cent. Dist. of Cal. 128 F.3d 1283 in which this Court denied certiorari. (522 U.S. 1099, 118 S.Ct. 899.)

Coleman v. Thompson, 501 U.S. 722 (1991) is in no way contrary to the notion of allowing the stay of a mixed petition or equitable tolling. That case concerns notions of comity, the federal court respecting the state's rights to make an initial determination concerning criminal matters within its jurisdiction. However, stay of mixed petitions, or equitable tolling, for the purpose of exhausting state court issues, in no

---

[1] Petitioner raises this new issue for the first time on this appeal, which may not be done. In its brief, and at oral argument, petitioner conceded equitable tolling may occur, as to the statute of limitations involved herein, merely contended such theory does not apply in this case.

way detracts from or diminishes the precepts of comity.

Teague v. Lane, 489 U.S. 346 (1989) merely noted issues therein were not ripe for review. It noted that the petitioner could dismiss the mixed petition, and later when the state issues were exhausted could refile the petition. At that time, statute of limitations was not a problem. It, as other cases which discuss the need to exhaust state remedies, do not state when a mixed petition needs to be dismissed. Such cases do not state that such need to be dismissed prior to the petitioner being given the chance, through a stay of proceedings, to exhaust the state remedies. There is nothing inconsistent with granting the stay, then if the petitioner does not take advantage of such, by proceeding to exhaust state remedies, then dismissing the petition.

Lamph v. Gilbertson, 501 U.S. 350 (1991), which involved sale of limited partnerships, indicated there can be equitable tolling in civil cases.

United States v. Brockamp, 519 U.S. 347 (1997) was a tax refund case, which like Beggerly, already had a tolling provision built into it; where, the statute was tolled until the date of discovery. However, herein, the tolling issue is not date of discovery, but rather, the District Court in misleading respondent into believing he could dismiss his petition, without prejudice, then refile such. AEDPA does not account for that problem. Thus, unlike Brockamp and Beggerly, it cannot be said that the Court is implementing a tolling theory; where, Congress

has already provided for such a situation.

Lonchar v. Thomas, 517 U.S. 314 (1996), a habeas corpus case, does not say there may be no equitable tolling, in such cases. Statute of limitations was not an issue in that case.

Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999) supports respondent's position. Taliani held equitable tolling is permissible. It holds the one year period is not jurisdictional. It merely holds that an attorney's error is not grounds for tolling.

David v. Hall 318 F.3d 343 (1st Cir. 2003) notes Congress recognized there should be tolling; wherein, the government impedes habeas corpus relief. Herein, the government, albeit the federal government, impeded relief wherein the District Court, upon its own initiative, induced respondent to dismiss his habeas corpus, which absent tolling, would have prevented relief. David recognized the one year period is not jurisdictional. Further, it is a case involving neglect of counsel, which is not the situation herein. In fact, in deciding the case, David assumed the existence of equitable tolling. David recognizes tolling in the most exigent circumstance. Herein, that exigent circumstance is the District Court's inducing respondent to act to his detriment, a classic equitable tolling/estoppel, situation.

Biggs v. Duncan 01-15817 (9th Cir. 2003) in footnote 3 recognizes the permissibility of staying the petition while any unexhausted claims are exhausted. Regarding petitioner's comment that the stay procedure should not be an excuse for habeas

petitioner's to fail to first exhaust their state remedies, it must be remembered that, most habeas corpus petitioner's are not represented by counsel in state or federal habeas corpus proceedings. Thus, these petitioners simply do not know, nor understand, what procedural requirements are involved; untrained and without counsel's guidance.

Respondent cites several cases for the proposition that for a court to determine whether there is a statute of limitations problem, to help a habeas corpus petitioner to determined the procedural devise to use, is not a compelling argument, in general or herein.

In general, at some point in time, the District Court will have to make that determination. It is just a matter of whether the Court will have to do so, at the time a petitioner is confronted with the problem of unexhausted claims, or, at the time the government seeks to have the petition dismissed for lack of complying with the one year statute. So, since a District Court is going to have to make that determination, anyway, there is no reason for the District Court not to do such, at a time when the petitioner has not acted to his prejudice by dismissing a petition thinking such could be refiled. This is particularly true wherein, as is usually the case, the habeas petitioner has not been appointed counsel.

In this case, since it was the District Court who proffered the procedure to respondent, which is now the issue in this case, it was incumbent upon said Court, to determine the effect of the

AEDPA statute, upon the statute of limitations, before inducing respondent to act to his potential detriment.

Petitioner claims respondent was not diligent in allowing 85 days of time between the first and second federal habeas corpus petitions. This may seem a long time for petitioner's counsel, who has the luxury of being able to work on legal documents at any time he chooses, with always available legal research resources and materials. However, respondent, unlike said counsel, must prepare his legal documents while locked up, locked down and locked in. He has limited access to legal materials, time in which he can do the preparation, and, conditions which make it expedient to prepare his documents.

Dated: December 1, 2003 LAW OFFICES KENNETH M. STERN

BY: _____
KENNETH M. STERN, ATTORNEY FOR APPELLANT.

Supreme Court, U.S.
FILED
DEC 1 1 2003
OFFICE OF THE CLERK

No. 03-357

IN THE SUPREME COURT OF THE UNITED STATES

DERRAL G. ADAMS, Warden; C.A. TERHUNE, Director, California Department of Corrections, *Petitioners,*

v.

MICHAEL D. BRAMBLES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-357

DERRAL G. ADAMS, Warden; C.A. TERHUNE, Director, California Department of Corrections, *Petitioners,*

v.

MICHAEL D. BRAMBLES, *Respondent.*

Derral G. Adams, Warden of California Substance Abuse Facility at Corcoran, California, and C.A. Terhune, Director of the California Department of Corrections (collectively "the State"), respectfully submit this reply to petitioner Michael D. Brambles's opposition to the petition for writ of certiorari ("the opposition"). In the petition, the State seeks review on two questions: (1) Is dismissing a mixed petition under *Rose v. Lundy*, 455 U.S. 509, 522 (1981), improper unless the district court first offers to stay the federal proceedings pending exhaustion of state remedies and advises that the period of limitation would bar a future petition?; and (2) May the period of limitation be equitably tolled because a prior district court dismissed a mixed habeas petition after the period expired without offering to stay the petition pending exhaustion and advising that the period would bar a future petition?

A. *Rose v. Lundy*

This Court has unequivocally and repeatedly held that "a district court *must* dismiss habeas petitions containing both

unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981) (emphasis added); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982). Nonetheless, as to the first question presented, Brambles argues that *Rose v. Lundy* is actually consistent with the holding in this case because *Rose* considered the habeas statute before the 1996 enactment of the one-year period of limitation codified at 28 U.S.C. § 2244(d), and this case considered the new habeas statute. He alleges that "*Rose* was based upon the premise that a petitioner would have the ability to dismiss and refile." (Opp'n at 2-5.) Brambles's argument affirms the need for this Court's review of this issue. Although the State disagrees with Brambles's conclusion that federal courts need no longer follow *Rose*, the State agrees that the enactment of the period of limitation in 1996 is an intervening fact that has engendered a circuit split of authority on this issue. *Compare Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003), *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001), and *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000), *with Warren v. Garvin*, 219 F.3d 111, 114-15 (2d Cir. 2000), *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996), and *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995).

An Eighth Circuit case, issued on the day the State's petition was filed, *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), further underscores this split of circuit authority. In *Akins*, the Eighth Circuit addressed a habeas petitioner's claim that the district court should have stayed his mixed petition while he exhausted his newly-presented claims because the AEDPA's one-year period of limitation had lapsed while his petition was pending in federal court. *Id.* at 685. The court noted in reviewing the claim that "absent a stay or equitable tolling, Akins will be unable to return to federal court following exhaustion of his state court remedies." *Id.* The court nevertheless rejected the petitioner's contention, explicitly

disagreeing with the holding of this case:

> Several circuits have concluded that a stay is required or is reasonable in cases of mixed habeas petitions where a dismissal would "jeopardize the petitioner's ability to obtain federal review" in light of AEDPA's one-year statute of limitation. *Nowaczyk* [*v. Warden, New Hampshire State Prison*], 299 F.3d [69,] . . . 79 [(1st Cir. 2002)]; *see also Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001), *cert. denied*, 534 U.S. 1015 . . . (2001); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000), *cert. denied*, 531 U.S. 946 (2000). Justice Stevens stated in his concurring opinion in *Duncan* [*v. Walker*, 533 U.S. 167] that "although the Court's pre-AEDPA decision in *Rose v. Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." *Duncan*, 533 U.S. at 182-83 . . . (Stevens, J., concurring in part and concurring in the judgment) (citation omitted).
>
> While this view may be the "growing consensus," *Nowaczyk*, 299 F.3d at 79, it has not yet been adopted by a majority of the members of the Supreme Court or by this circuit. Absent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as expressed in *Rose v. Lundy*. We have held, post-AEDPA, that "a district court has no authority to hold a habeas petition containing unexhausted claims in abeyance absent truly exceptional circumstances,

> such as when state remedies are inadequate or fail to afford a full and fair adjudication of federal claims, or when exhaustion in state court would be futile." *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (citing *Victor v. Hopkins*, 90 F.3d [at 279-80 & n.2, 282 . . .]). Habeas petitioners who delay filing for state postconviction relief "should be held responsible for their failure to fulfill the long-standing requirement that they exhaust state remedies." *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Akins has asserted unexhausted claims and there is no showing that it would be futile for him to pursue his available state court remedy, which he would have been wise to pursue in the first instance. We cannot conclude that the district court abused its discretion in not granting a stay *sua sponte*. *See Thompson v. Sec. for Dep't of Corr.*, 320 F.3d 1228, 1229-30 & n.3 (11th Cir. 2003) (holding district court did not abuse its discretion by dismissing mixed petition in spite of petitioner's argument that he had no choice but to file a mixed petition in order to meet the one-year filing deadline of AEDPA and preserve federal review for the exhausted claims).

Id. at 685-86.

As in *Akins*, the one-year limitation period lapsed while Brambles pursued his unexhausted claims in district court. The district court, however, was "bound to follow . . . the Supreme Court's view [requiring dismissal of mixed petitions] as expressed in *Rose v. Lundy*." *Akins*, 341 F.3d at 686; *see also Duncan v. Walker*, 533 U.S. 167, 178-80 (2001). As Second and Fifth Circuit law is also contrary to Ninth Circuit law on this issue (*see* Pet. for Writ of Cert. at 8-12), the Ninth Circuit's holding is in direct conflict with the holdings of this Court and at least three other circuit courts of appeals.

B. Equitable Tolling

The State made two arguments in support of the second question presented in the petition for writ of certiorari: (1) the period of limitation is not subject to equitable tolling; and (2) in any event, equitable tolling would not be present based on a prior district court's failure to offer to stay and abey a mixed petition and notify the petitioner that a future petition would be time-barred. (Pet. for Writ. of Cert. at 13-18.) In the opposition, Brambles asserts that the State waived its first argument, that the AEDPA's period of limitation cannot be equitably tolled:

> Petitioner raises this new issue for the first time on this appeal, which may not be done. In its brief, and at oral argument, petitioner conceded equitable tolling may occur, as to the statute of limitations involved herein, [and] merely contended such theory does not apply in this case.

(Opp'n at 6 n.1.) The State disagrees.

It is true that the State did not argue in the Ninth Circuit that the limitation period was not subject to equitable tolling and instead argued that equitable tolling should not apply in this circumstance, applying the established Ninth Circuit test for equitable tolling under 28 U.S.C. § 2244(d). Brambles, however, mischaracterizes the State's omission of argument on this settled point of circuit law as a concession; the State never "conceded" that 28 U.S.C. § 2244(d) was subject to equitable tolling, either in its briefs or at oral argument.

The State may raise that threshold argument now. Supreme Court Rule 14(a) provides, "Only the questions set out in the petition [for writ of certiorari], *or fairly included therein*, will be considered by the Court." Emphasis added. Although this Court ordinarily does not consider an *issue* not raised below, it has long held that a party may raise a new *argument* in

support of that issue. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995); R. Stern & E. Gressman, Supreme Court Practice §§ 6.25, 6.26, pp. 415-16, 421 (8th ed. 2002).

In *Lebron*, the petitioner "expressly disavowed" an argument in the lower courts, but argued in his merits brief in this Court that Amtrak was a government entity under the First Amendment. 513 U.S. at 379. In the lower courts and in his certiorari petition, petitioner had claimed only that Amtrak was a private entity closely connected to the government. *Id.* This Court concluded that whether Amtrak was a "government entity" was "fairly included" in the question set forth in the petition. *Id.* at 379-80. The Court explained that

> it is quite impossible to consider whether the Government connections are sufficient to convert private-entity Amtrak into a Government actor without first assuming that Amtrak is a private entity. . . . The question of private-entity status is, in other words, a *prior* question.

Id. at 381; *see also Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980) ("[s]ince resolution of this question of law is a 'predicate to an intelligent resolution' of the question on which we granted certiorari, [citation], we must address it").

Similarly, here, the question of whether there is equitable tolling when a prior district court fails to stay a mixed petition fairly includes the question of law of whether the AEDPA's period of limitation is subject to equitable tolling. One cannot decide the former question without assuming an affirmative answer to the latter. The State's argument that the limitation period is not subject to equitable tolling does not raise a new issue but merely a new argument to support what has been the State's consistent claim, that Brambles is not entitled to equitable tolling of the period of limitation. Furthermore, the State never disavowed this argument below. In addition, the

State is raising this particular argument in the certiorari petition, not for the first time in a merits brief before this Court.

Moreover, five years before the State's briefing below, the Ninth Circuit held that the limitation period could be equitably tolled and explicitly rejected the very argument that the State now seeks to make in this Court regarding the existence of equitable tolling. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287-89 (9th Cir. 1997), *reh'g and reh'g en banc denied* (1997), *overruled on another ground, Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998) (*en banc*); *see also Kelly*, 163 F.3d at 535 (recognizing "our holding that this limitations period can be equitably tolled in the proper circumstances"); *id.* at 545 (Hall, J., dissenting) ("*Beeler* expressly held (a holding that the en banc majority does not disturb) that the AEDPA's statute of limitations was not jurisdictional"). Thus, the Ninth Circuit had already "passed upon" and rejected this particular legal argument at the time of this case. *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001). Therefore, it was unnecessary to redundantly remake the argument in the Ninth Circuit.

Brambles also argues that equitable tolling is appropriate because the prior district court did not sufficiently "help" him. He argues that pro se prisoners like himself "simply do not know, nor understand, what procedural requirements are involved; untrained and without counsel's guidance." (Opp'n at 8-10.) This Court, however, has insisted on a total exhaustion rule even for petitioners unrepresented by counsel, explaining, "Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement." *Rose v. Lundy*, 455 U.S. at 520. If the period of limitation potentially impacts this black letter law, it is for this Court, not the Ninth Circuit, to make the change. *See Akins*, 341 F.3d at 686 ("[a]bsent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as

expressed in *Rose v. Lundy*").

Brambles's other arguments purport to distinguish several cases on equitable tolling that the State cited in its petition. (Opp'n at 5-9.) Rather than weigh down this certiorari reply brief with retorts to Brambles's merits arguments, suffice it to reemphasize:

> [S]ection 2244(d) comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions. Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort. [Citation.] AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up.

David v. Hall, 318 F.3d 343, 346 (1st Cir. 2003); *see also Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) ("[g]iven this and other express tolling provisions (28 U.S.C. §§ 2244(d)(1)(B), (C), (2)), it is unclear what room remains for importing the judge-made doctrine of equitable tolling"). Accordingly, extension of the one-year period set forth in the AEDPA by equitable tolling is "unwarranted," *see United States v. Beggerly*, 524 U.S. 38, 49 (1998), and "unnecessary," *see Lampf v. Gilbertson*, 501 U.S. 350, 363 (1991).

The second question presented is an unresolved one impacting the vitality of the two major statutory procedural defenses to habeas corpus petitions: untimeliness and unexhaustion. (*See* Pet. for Writ of Cert. at 13-18.) And nothing in petitioner's opposition even purports to contradict that seven members of this Court have recognized that it remains an open question whether equitable tolling exists when the period of limitation expires during the pendency of a prior mixed habeas petition. *Duncan v. Walker*, 533 U.S. at 181; *id.* at 182 (Souter, J., concurring); *id* at 182-83 (Stevens, J.,

concurring). (*See* Pet. for Writ of Cert. at 12-13.) This Court in *Duncan* expressly reserved the question of equitable tolling because the prior district court dismissed the petition *before* the limitation period expired. *Duncan*, 533 U.S. at 181-82. Here, by contrast, the prior district court dismissed the mixed petition *after* the limitation period expired. (Pet. for Writ of Cert., App. A-6.) Therefore, this Court can resolve this significant question in this case.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Dated: December 10, 2003

Respectfully submitted,

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